RECORD
AND
BRIEFS

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No. 16-8255

IN THE
Supreme Court of the United States

ROBERT MCCOY, *Petitioner*,

v.

STATE OF LOUISIANA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

AMICUS BRIEF OF THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PROMISE OF JUSTICE INITIATIVE

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTERESTS OF *AMICI CURIAE* 1
INTRODUCTION 3
SUMMARY OF THE ARGUMENT 6
ARGUMENT 8
I. In Louisiana, A Capital Defendant Has No Right To A Lawyer Who Will Insist On His Innocence. 14
a. In four capital appeals since 2000, the Louisiana Supreme Court has allowed defense counsel to concede his client's guilt over his express objection. 16
b. In four capital cases since 2000, capital defendants have been forced to represent themselves rather than acquiesce to a lawyer conceding their guilt. 17
c. The Louisiana courts have permitted a capital defendant to expressly waive penalty phase claims or preclude defense counsel from presenting mitigating evidence. 19
II. Louisiana Continues To Ignore The Principles of *Batson*. 21
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Boyer v. Louisiana, 133 S. Ct. 1702 (2013) 27

Brookhart v. Janis, 384 U.S. 1 (1966) 7, 13, 14

Dorsey v. Louisiana, 566 U.S. 930 (2012) 9, 31

Faretta v. California, 422 U.S. 806 (1974) ... 7, 9, 10

Florida v. Nixon, 543 U.S. 175 (2004) 7, 16

Flowers v. Mississippi, 136 S. Ct. 2157 (2016) 28

Foster v. Chapman, 136 S. Ct. 1737 (2016) 28

Gideon v. Wainwright, 372 U.S. 335 (1963) 7, 10

Gonzalez v. United States, 553 U.S. 242 (2008) 12

Haynes v. Cain, 298 F.3d 375 (5th Cir. 2002) 19

Illinois v. Allen, 397 U.S 337 (1970) 11

Indiana v. Edwards, 54 U.S. 164 (2008) 8

Jackson v. Virginia, 443 U.S. 307 (1979) 33

Jones v. Barnes, 463 U.S. 745 (1983) 11, 17

McKaskle v. Wiggins, 465 U.S. 168 (1984) 7, 12

Pena-Rodriguez v. Colorado, 580 U.S. __, slip op. (2017) 10

Powell v. Alabama, 287 U.S. 45 (1932) 7, 10

Reed v. Louisiana, 137 S. Ct. 787 (2017) 3

Roper v. Simmons, 543 U.S. 551 (2004) 20

Snyder v. Louisiana, 552 U.S. 472 (2008) 10

State v. Bell, 53 So. 3d 437 (La. 2010) 22

State v. Bordelon, 33 So.3d 842 (La. 2009) 16, 24

State v. Bridgewater, 823 So. 2d 877 (La. 2002) 20

State v. (David) Brown, 0000-C-520401 (17th JDC) (2016) 15, 24

State v. (Greg) Brown, 907 So. 2d 1 (La. 2005) 23

State v. Campbell, 983 So. 2d 810 (La. 2008) 22

State v. Carter, 84 So. 3d 499 (La. 2012) 25

State v. Clark, 2016 La. LEXIS 2512 (La. Dec. 19, 2016) 22

State v. Crawford, 2016 La. Lexis 2376 (2016) 32, 33

State v. Felde, 422 So.2d 370 (La. 1982)..... 24

State v. Haynes, 662 So. 2d 849 (La.App. 2 Cir. Nov. 1, 1995)..... 18

State v. Leger, 936 So. 2d 108 (La. 2006)..... 20

State v. Louviere, 833 So. 2d 885 (La. 2002) 26

State v. McCoy, 2016 La. LEXIS 2107 (La. Oct. 19, 2016)..... passim

State v. Tucker, 181 So. 3d 590 (La. 2015) 19

Tucker v. Louisiana, 136 S. Ct. 1801 (2016) 3

Tyler v. Louisiana, 137 S.Ct. 589 (2016)..... 21

United States v. Cronic, 466 U.S. 648 (1984) 7, 11, 15

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 7

Williams v. Louisiana, 136 S. Ct. 2156 (2016)9, 27, 32

Statutes

La. C. Cr. P. art. 795 (D) 31

La. C. Cr. P. art. 795 (E) 28

La. C. Cr. P. art. 912.1(A)(2) 16

Louisiana Supreme Court Rules, District Court Rule Title III, Chapter 19 Appendix 32

Other Authorities

ABA Model Rules of Professional Conduct 1.2(a) (2007) 5

Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty,* 65 ALB. L. REV. 181 (2001) 26

Dressner v. Louisiana, Brief of LACDL, 2010 U.S. Briefs 752 (U.S. Jan. 5, 2011) 29, 30

Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 Am. J. Crim. L. 363 (2003) 15

Louisiana Administrative Code, Title 22, Part XV, Chapter 19 (Performance Standards for Criminal Defense Representation in Indigent Capital Cases) 5, 14

Miller v. Louisiana, Brief of LACDL, 2012 U.S. Briefs 35706 (U.S. Sept. 4, 2012) 29

Snyder v. Louisiana, Brief of LACDL, 2006 U.S. Briefs 10119 (U.S. May 18, 2007) 29, 30

The Life, Trial and Execution of Captain John Brown, Known as "Old Brown of Ossawatomie" With a Full Account of the Attempted Insurrection at Harpers Ferry (1859) 9

INTERESTS OF *AMICI CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana.

LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL acts as *amicus curiae* in cases where the rights of defendants are implicated. LACDL has filed amicus briefs concerning the role of counsel in capital cases as well as Louisiana's sordid history of race-based strikes.

The Promise of Justice Initiative (PJI) is a non-profit organization founded in New Orleans, Louisiana, to address issues of injustice. PJI, amongst other work, drafts policy papers and files amicus briefs in the state and federal courts, including this Court.

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[1] Pursuant to this Court's Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

Amici have a distinct interest from petitioner and respondent in this case – denoting the intractable difficulty of ensuring autonomy of a criminal defendant while protecting the state's interest in a fair and reliable administration of punishment.

Amici also have a distinct perspective based upon our collective experience within Louisiana, on the operation of the rule of criminal procedure for jury strikes, and the impact that race plays in the administration of the justice system in Louisiana.

INTRODUCTION

The Louisiana Supreme Court's decision in *State v. McCoy* transforms the shield of the Sixth Amendment – the right "to have the assistance of counsel for his defense" – into the state's cudgel. It is the clarifying culmination of a series of cases in which the Louisiana Supreme Court has essentially countenanced the choice left capital defendants in Louisiana: accept a lawyer's admission of your guilt over express objection or represent yourself. LACDL believes that the Louisiana Supreme Court's decision in the underlying case threatens to "convert the appointment of counsel into a sham, and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."[2]

The death penalty in Louisiana is despoiled by racial, geographic, and economic arbitrariness. See *Reed v. Louisiana*, 137 S. Ct. 787 (2017) (Breyer, J., dissenting from denial of certiorari); *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (Breyer and Ginsburg, JJ., dissenting from denial of certiorari).

Within this landscape of arbitrariness, an uncomfortable number of death sentences in Louisiana are the result of defendants representing themselves or defendants expressly objecting to

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[2] *United States v. Cronic*, 466 U.S. 648, 665 (1984).

their lawyers' concessions of guilt. In addressing the fraught nature of attorney-client relationships, the Louisiana Supreme Court has further stacked the deck against defendants by adopting a set of rules that always militates in favor of the state and against the defendant.

But even more important than the technical effect of these rules – their application undermines, where it is needed most, the very core dignity and autonomy that the Constitution was enshrined to protect. LACDL believes in the Constitution, and in the checks and balances that the Constitution imposes on the governmental exercise of power. Nowhere is that check more important than in the government's exercise of the power to prosecute in a capital case.

LACDL firmly believes that the role of counsel is to protect the dignity and autonomy of each defendant; that where a client is competent to proceed, that it would never be appropriate to concede guilt over a client's objection; and further, that where a lawyer undertakes the strategy of conceding guilt in order to secure mitigation of sentence, that the lawyer would only do so with the consent and approval of his client. See Louisiana Administrative Code, Title 22, Part XV, Chapter 19 (Performance Standards for Criminal Defense Representation in Indigent Capital Cases); LAC 22:XV.1903(F)(6) ("Counsel shall not take action he

or she knows is inconsistent with the client's objectives of the representation. Counsel may not concede the client's guilt of the offense charged or a lesser included offense without first obtaining the consent of the client."); LAC 22:XV.1915(F)2. ("Counsel should not put on a non-viable defense but at the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."); ABA Model Rules of Professional Conduct 1.2(a) (2007) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

Additionally, amici, and others, have brought to this Court's attention the historic efforts to disenfranchise African-American jurors, and the sordid role that race appears to play in the administration of justice, in jury selection, and particularly in administration of the death penalty in Louisiana. It is circumstantial evidence that a strike is race-based, where the state strikes a juror who the defendant also struck; but in Louisiana, this evidence cannot be considered. This issue is addressed in Section II of the amicus brief.

SUMMARY OF THE ARGUMENT

At its core, the Sixth Amendment right to the assistance of counsel promises to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make when confronted with the authority of the state. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brookhart v. Janis*, 384 U.S. 1 (1966); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). This Court has long grappled with the dignity and autonomy owed a defendant facing criminal punishment. *Faretta v. California*, 422 U.S. 806 (1974); *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *United States v. Cronic*, 466 U.S. 648 (1984); *Florida v. Nixon*, 543 U.S. 175 (2004); *Indiana v. Edwards*, 54 U.S. 164 (2008).

In contrast to long-standing principles of autonomy, the rule adopted in *State v. McCoy* permits counsel to concede a defendant's guilt over his objection – giving each capital defendant the choice of accepting his lawyer's unilateral decision to admit guilt or representing himself.

Gideon guarantees nothing if the provision of a lawyer is predicated on this caveat: that if the client objects to the lawyer admitting his guilt – whether of the charged offense or a lesser included sentence – he can represent himself. Imagine, if Alabama had offered the *Powell* defendants counsel

with the caveat that it was counsel's choice to concede their guilt and seek the Court's leniency? Over the Scottsboro Youths' insistence of their innocence? But this is the rule in Louisiana – for both retained and appointed counsel.[3]

In *Faretta v. California*, the Court warned that "[i]n the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber." *Faretta v. California*, 422 U.S. 806, 821 (1975). But a system like Louisiana's – where the vast majority of capital defendants are indigent, represented by state selected counsel – risks perversion of fundamental rights where counsel is allowed to plead a defendant guilty over his objection.

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[3] The tension between the tactical desire of counsel to secure leniency at sentencing and a defendant's insistence on his right to a defense is not new. The question of autonomy and dignity is raised with unflinching clarity in the prosecution of John Brown for treason and attempted insurrection at Harpers Ferry. Brown's local counsel believed that there was an insanity defense, but Brown rejected it entirely. Robert M. De Witt, *The Life, Trial and Execution of Captain John Brown, Known as "Old Brown of Ossawatomie" With a Full Account of the Attempted Insurrection at Harpers Ferry (1859)*, available at http://www.civilwar.org/education/history/john-brown-150/witnesses-and-testimony.html?.

This case also illustrates Louisiana's miserly response to continued concerns regarding race-based peremptory strikes. These issues have been raised repeatedly. See *Williams v. Louisiana*, 136 S. Ct. 2156 (2016); *Dorsey v. Louisiana*, 566 U.S. 930 (2012) (cert denied); *Snyder v. Louisiana*, 552 U.S. 472 (2008). Despite this Court's admonition that courts have an obligation to "purge racial prejudice from the administration of justice,"[4] the Louisiana courts have adopted a *laissez fair* attitude. This Court should intervene.

ARGUMENT

This Court's foundational cases make clear that the right to counsel is essential to protect a defendant's rights when the "whole power of the state arrayed against him." *Powell v. Alabama*, 287 U.S. 45, 72 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that assistance of counsel is a fundamental right, essential to a fair trial). In *Faretta*, this Court clarified that the right to counsel was a shield, not a burden, that prioritized a defendant's autonomy. *Faretta v. California*, 422 U.S. 806, 820 (1974) ("To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment."). As the defendant will "bear the personal consequences of a conviction," his choices "must be honored out of

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[4] *Pena-Rodriguez v. Colorado*, 580 U.S. __, slip op. at 13 (2017).

'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S 337, 350-51 (1970)) (Brennan, J., concurring). A lawyer who is permitted to concede his client's guilt over the express objection of the defendant transforms the right to counsel into a sham. *United States v. Cronic*, 466 U.S. 648, 665 (1984).

As Justice Brennan explained, the right to the assistance of counsel for a citizen's defense

> is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant.

Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan J., *dissenting*).

In an ongoing number of cases, this Court has made clear the role of counsel is to advance the client's autonomy and dignity. In *McKaskle v. Wiggins*, the Court accepted the role of an appointed lawyer as stand-by counsel because "[e]qually important, *all conflicts* between Wiggins

and counsel were resolved in Wiggins' favor." *McKaskle v. Wiggins*, 465 U.S. 168, 181 (1984) (emphasis added). And as Justice Scalia observed in *Gonzalez v. United States*, concurring:

> It is important to bear in mind that we are not speaking here of action taken by counsel over his client's objection – which would have the effect of revoking the agency with respect to the action in question.

Gonzalez v. United States, 553 U.S. 242, 254 (U.S. 2008) (Scalia, J., concurring).

This Court has never countenanced counsel as a noose around his client's case, conceding his guilt over his objection. Indeed in *Brookhart v. Janis*, the Court explained:

> His emphatic statement to the judge that "in no way am I pleading guilty" negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie case ...
>
> Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can

> confront and cross-examine the witnesses against him.
>
> We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances.

Brookhart v. Janis, 384 U.S. 1, 7 (1966). Even under Justice Harlan's concurrence – in which he asserted that "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval," Justice Harlan insisted that:

> Although it can be contended that the waiver here was nothing more than a tactical choice of this nature, I believe for federal constitutional purposes the procedure agreed to in this instance involved so significant a surrender of the rights normally incident to a trial that it amounted almost to a plea of guilty or nolo contendere. And I do not believe that under the Due Process Clause of the Fourteenth Amendment such a plea may be entered by counsel over his client's protest.

Brookhart v. Janis, 384 U.S. 1, 8-9 (1966) (Harlan, J., concurring).

The Louisiana Supreme Court has distorted these protections by undermining the values of

autonomy, dignity, and self-determination. Louisiana's approach has been to assess counsel's decision to override the authority of his client under the rubric of an ineffective assistance of counsel claim rather than assessing whether it is a capital defendant's personal choice.[5] The "dilution in a defendant's autonomy," creates a situation in which "a criminal defendant must put virtually all of his rights on the line – even those that are ostensibly reserved for his exclusive use – in order to exercise his Sixth Amendment right to counsel." Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 Am. J. Crim. L. 363, 396 (2003).

The Louisiana Supreme Court's rulings also lack consistency. Capital defendants who insist on their innocence or who seek to put the government's case to "the crucible of meaningful adversarial testing,"[6] are left with the impossible choice of representing themselves or acquiescing to defense counsel who concede their guilt over their objections. On the other hand, under the guise of promoting autonomy, where a capital defendant

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[5] *But see* LAC 22:XV.1903(F)(6) ("Counsel shall not take action he or she knows is inconsistent with the client's objectives of the representation. Counsel may not concede the client's guilt of the offense charged or a lesser included offense without first obtaining the consent of the client.").

[6] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

wishes to plead guilty and proceed to penalty,[7] or waived the right to present mitigating evidence at the penalty phase,[8] waived the right to appeal,[9] or even has volunteered for execution,[10] the Court has determined that defendants have a right to make a "knowing and intelligent waiver" at these stages, even when such a waiver would almost certainly ensure death. *Bordelon*, 33 So.3d 842 at 849-50.[11]

What can be distilled from Louisiana's approach is that when a question about a defendant's autonomy arises, Louisiana appears to resolve the question in favor of expediency, rather than autonomy or dignity. This Court's decision in *Florida v. Nixon*[12] surely did not anticipate a legal

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[7] *State v. Louviere*, 833 So. 2d 885 (La. 2002).

[8] *State v. Brown*, 0000-C-520401 (17th JDC) (2016).

[9] *State v. Bordelon*, 33 So.3d 842, 864 (La. 2009).

[10] *Id.*

[11] Louisiana codified this principle in 2010, when it amended the code of criminal procedure to require judges to inform defendants in capital cases "both in writing and orally of his this right to waive appeal upon appointment of appellate counsel." See Acts 2010, No. 674; La. C. Cr. P. Art. 912.1(A)(2). The law was introduced as a cost-saving measure.

[12] In *Florida v. Nixon*, 543 U.S. 175 (2004), defense counsel explained to defendant the strategy of conceding his guilt in order to avoid the death penalty, but Nixon was generally unresponsive, "never verbally approv[ing] or protest[ing] [defense counsel's] proposed strategy." *Id.* at 182. *Cf. State v. McCoy*, 2016 La. LEXIS 2107 (La. Oct. 19, 2016) (noting

regime wherein defendants (predominantly indigent defendants) were perpetually disadvantaged. Louisiana must ensure the same autonomy contemplated by the Court's Sixth Amendment protections in its approach to deciding cases relating to a concession of guilt over a defendant's objection. As Justice Brennan understood, "[t]he role of the defense lawyer should be above all to function as the instrument of the client's autonomy and dignity in all phases of the criminal process." *Jones v. Barnes*, 463 U.S. 745 (1983) (Brennan, J., dissenting).

While amici acknowledges that it might be easier and less expensive to operate a criminal justice system where a lawyer could – over his client's objections – admit his client's guilt and plea for leniency, the Constitution was not adopted for expedience sake, and this Court has recognized that such a system would be a sham.

I. In Louisiana, A Capital Defendant Has No Right To A Lawyer Who Will Insist On His Innocence.

The Louisiana Supreme Court has held that a capital defendant who insists upon his innocence must represent himself, or else allow his lawyer to admit his guilt over his objection.

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numerous disagreements on the record about defense strategy between defendant and defense counsel).

Louisiana's view of the role of counsel is as trustee rather than agent, as guardian ad lidem rather advocate. In this context, the Louisiana courts address the concession of guilt under a *Strickland v. Washington* analysis, rather than considering the autonomy of a defendant. Whatever the salutary benefits of a such a system, it is not ours. The apparent origins of Louisiana's rule is in *State v. Haynes*, where a Caddo Parish defense attorney conceded his client's guilt of second degree murder over the client's objection. *State v. Haynes*, 662 So. 2d 849, 852 (La.App. 2 Cir. Nov. 1, 1995) ("Haynes specifically asserts that he did not want his lawyers to argue that he was guilty of any of the accusations made by the State. Haynes notified the judge[13] of this preference, in plain language, during the opening statement of the defense.... Where the assertion that counsel was ineffective rests on actions of counsel pertaining to the incident proceedings, the *Strickland* test is applicable."). While the *Haynes* case has had a complicated subsequent history, the Fifth Circuit Court of Appeal has ultimately upheld the state court determination "that the Louisiana state court properly identified *Strickland* as the

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[13] The trial court judge in *Haynes*, who rejected the defense objection to his trial counsel's concession, is now a justice on the Louisiana Supreme Court. *Id.* ("Appealed from the First Judicial District Court for the Parish of Caddo, Louisiana. Trial Court No. 166,637. Honorable Scott J. Crichton Judge).

correct governing legal principle." *Haynes v. Cain*, 298 F.3d 375, 382 (5th Cir. 2002). In Louisiana, as such, the courts now countenance counsel's control over the decision to admit guilt.

a. In four capital appeals since 2000, the Louisiana Supreme Court has allowed defense counsel to concede his client's guilt over his express objection.

1. Eighteen-year-old Lamondre Tucker was forced to proceed with a lawyer who, over his objection, admitted his guilt of all the elements of first degree murder – while arguing to the jury to impose a lesser verdict. *State v. Tucker*, 181 So. 3d 590 (La. 2015) ("Defendant alleges he did not acquiesce in the decision of defense counsel to admit guilt of second degree murder and feticide in closing.").

2. Donald Leger was forced to accept counsel whose strategy was to admit his guilt over his objection. When Leger characterized his counsel as "bad", the Court informed him that he had a choice to accept counsel or represent himself. *State v. Leger*, 936 So. 2d 108, 148 (La. 2006) ("Mr. Leger: Your Honor, between choosing bad counsel and representing myself, I would have no choice other but to represent myself.").

3. Roy Bridgewater, a seventeen-year-old defendant facing capital charges who sought to insist on his innocence, was told that he must accept his current counsel's decision to admit guilt of second degree murder. *State v. Bridgewater*, 823 So. 2d 877, 895 (La. 2002).[14]

4. James Tyler was forced to proceed with counsel who, over his objection, admitted his guilt. See *Tyler v. Louisiana*, 137 S.Ct. 589 (2016) (cert denied) addressing *State v. Tyler*, 2013-0913 (La. 11/06/15), 181 So. 3d 678 (denying Tyler's post-conviction challenge to his trial counsel's concession of guilt over his express objection).

b. In four capital cases since 2000, capital defendants have been forced to represent themselves rather than acquiesce to a lawyer conceding their guilt.

There have been thirty-four death sentences since 2004 in Louisiana. In four of those cases, clients have represented themselves rather than accept their counsel's admission of guilt.

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[14] Bridgewater's sentence was set aside as a result of *Roper v. Simmons*, 543 U.S. 551 (2004).

1. Jeffrey Clark was given the choice of representing himself during his trial or enduring "counsels' approach of building jury trust by admitting participation in the attempted aggravated escape, thereby rendering a second degree murder conviction and life sentence more likely." *State v. Clark*, 2016 La. LEXIS 2512 (La. Dec. 19, 2016).

2. Anthony Bell was given the choice of representing himself or enduring a second lawyer with whom he had a breakdown in the relationship. *State v. Bell*, 53 So. 3d 437, 446 (La. 2010).

3. Laderick Campbell, who insisted on his innocence, was forced to represent himself or accept a lawyer who would concede his guilt. *State v. Campbell*, 983 So. 2d 810, 854 (La. 2008) ("As appointed defense counsel stated in the closed hearing, the state's evidence against the defendant was 'so strong' that the best result sought by even experienced counsel in the guilt phase of trial was a conviction of second degree murder.").

4. Greg Brown was forced to represent himself or accept a lawyer who had "abandoned [his] defense." *State v. Brown*, 907 So. 2d 1, 24 (La. 2005).

c. The Louisiana courts have permitted a capital defendant to expressly waive penalty phase claims or preclude defense counsel from presenting mitigating evidence.

1. In the only execution to occur since 2002, the Court permitted the defendant to waive the presentation of mitigating evidence. See *State v. Bordelon*, 33 So.3d 842, 864 (La. 2009) (allowing defendant to "limit his defense consistent with his wishes at the penalty phase of trial.") (quoting *State v. Felde*, 422 So.2d 370, 395 (La. 1982)). Bordelon was then permitted to waive his appeals and volunteer for execution.

2. David Brown was permitted to waive presentation of mitigating evidence, ensuring imposition of a death sentence. *State v. Brown*, 0000-C-520401 (17th JDC) (2016). His case is currently pending in the Louisiana courts.

3. The Louisiana Supreme Court permitted the mentally ill Terrance Carter to waive claims concerning his motion for new trial. *State v. Carter*, 84 So. 3d 499, 520 (La. 2012) ("Here, defendant did not express any desire to waive his right to counsel and to represent himself as in a Faretta situation, or even to serve fully as co-counsel, but rather, he sought only to withdraw a single post-trial motion that counsel wished to pursue."). Carter hung himself while on death row.

4. The Court upheld the decision of Chad Louviere, a capital defendant, to plead guilty and proceed to penalty phase. See *State v. Louviere*, 833 So. 2d 885, 894 (La. 2002) (determining that Faretta right includes right to plead guilty in capital case) (citing Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181, 182-83 (2001)) (noting that a defendant's prerogative to plead guilty, even for crimes punishable by death, was described as early as the seventeenth century in England).

Rather than a principled and consistent commitment to the autonomy and dignity of capital defendants, the Louisiana Supreme Court has

adopted a set of rules that ameliorates always to the benefit of the state, and never to the defendant. Given the widespread challenges in Louisiana with regard to funding of indigent defense,[15] and the overwhelming obligations placed on defense counsel, a system that permits counsel to concede his client's guilt over the client's express objections risks the even sub-conscious incentivizing of expediency over rigor.

II. Louisiana Continues To Ignore The Principles of *Batson*.

This Court, in *Williams v. Louisiana*, remanded the case to the lower courts to consider what four members described as the operation of a "procedural rule that permits the trial court, rather than the prosecutor, to supply a race-neutral reason at Batson's second step if 'the court is satisfied that such reason is apparent from the voir dire examination of the juror.'" *Williams v. Louisiana*, 136 S. Ct. 2156 (2016) (Ginsburg, J.,

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[15] See *Boyer v. Louisiana*, 133 S. Ct. 1702, 1708 (2013) (Sotomayor, J. Breyer, J., Ginsburg, J., Kagan J., dissenting) (noting the "case appears to be illustrative of larger, systemic problems in Louisiana. The Louisiana Supreme Court has suggested on multiple occasions that the State's failure to provide funding for indigent defense contributes to extended pretrial detentions. . . . There is also empirical evidence supporting that assessment. ... . More broadly, the public defender system seems to be significantly understaffed.) (internal citations omitted).

Breyer J., Sotomayor, J., and Kagan, J., concurring) citing La. C. Cr. P. art. 795 (E). The concurrence explained that "Louisiana's rule, as the Louisiana Supreme Court has itself recognized, does not comply with this Court's *Batson* jurisprudence." *Id.* Justice Alito and Thomas dissented from the decision to grant, vacate, and remand in light of *Foster v. Chapman*, 136 S. Ct. 1737 (2016), because "It is, rather, a GVR in light of our 1986 decision in *Batson*." See *Id.*, citing *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016) (Alito and Thomas, JJ., *dissenting*). Whether the appropriate remand relief is governed by *Batson* or *Foster*, the disregard of constitutional protections is clear.

Amici has filed a series of briefs in this Court denoting entrenched resistance to redressing racism in Louisiana. See *Dorsey v. Louisiana*, 566 U.S. 930 (2012) ("Motion of Louisiana Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae granted. Petition for writ of certiorari to the Supreme Court of Louisiana denied."); *Dressner v. Louisiana*, Brief of LACDL, 2010 U.S. Briefs 752, 4-8 (U.S. Jan. 5, 2011) (noting the continued refusal of Louisiana courts to address *Batson* since the Court's decision in *Snyder v. Louisiana*); *Snyder v. Louisiana*, Brief of LACDL, 2006 U.S. Briefs 10119 (U.S. May 18, 2007); *Cf. Miller v. Louisiana*, 2012 U.S. Briefs 35706, 23 (U.S. Sept. 4, 2012) (noting connection between

Louisiana's non-unanimous jury rule, which originated during the all-white constitutional convention of 1898, and its resistance to following Batson).

In amici's brief in *Snyder*, LACDL noted that out of 178 cases involving *Batson* challenges, the Louisiana appellate courts had denied relief in all but four (and that in one of those cases granting *Batson* relief the Louisiana Supreme Court had reversed the finding of discrimination). The *Snyder* brief also noted that the Louisiana Supreme Court itself had denied relief in 30 of the 32 cases which raised *Batson* error on appeal – and that one of the two grants of relief involved a case where the prosecutor affirmatively explained that she struck a juror because he "was a single black male without children" and she did not want him relating to the defendant who she said was also a "single black male without children." *Snyder v. Louisiana*, Brief of LACDL, 2006 U.S. Briefs 10119 (U.S. May 18, 2007).

In the *Dressner* case, LACDL noted that the Louisiana Supreme Court had denied relief in every case after the *Snyder* remand – and that the appellate courts had denied relief in every case but one, which was subsequently reversed by the Louisiana Supreme Court. See *Dressner v. Louisiana*, Brief of LACDL, 2010 U.S. Briefs 752 (U.S. Jan. 5, 2011) (noting "no positive change in

the protection afforded by Batson to defendants in Louisiana.")

In the amicus brief in *Dorsey v. Louisiana*, LACDL observed that "Empirical research undertaken in several Louisiana jurisdictions has ... documented a significantly higher rate of prosecution peremptory challenges against African American jurors." See *Dorsey v. Louisiana*, Brief of LACDL.

In addition to "the procedural rule" identified in *Williams* which "permits the trial court, rather than the prosecutor, to supply a race-neutral reason at Batson's second step", Louisiana has an even more nefarious substantive rule that (as interpreted by the Louisiana courts) prevents trial court from considering evidence of race-based decision making in specific situations. See La. C Cr. P. art. 795 (D) ("The provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror."). In *State v. McCoy*, the Louisiana Supreme Court held that what might be the strongest evidence of race-based strikes could not be considered as relevant evidence of the State's racial animus because the prosecutor's strikes were exercised simultaneously to the defense. In Louisiana, thirty-three of the forty-two of the judicial districts have provisions for simultaneous strikes, and so in each of these

jurisdictions where a prosecutor strikes an African-American juror who is so pro-state or pro-death that the juror is also struck by the defense, this discrimination is deemed irrelevant to the trial court's assessment of the state's explanations for other strikes at the third stage of the *Batson* analysis.[16]

The Louisiana Supreme Court has continued the trend of rejecting challenges to race-based jury selection in all but the rarest case. The Court recently granted relief in *State v. Crawford*, noting *Williams v. Louisiana*, 136 S. Ct. 2156 (2016), observing: "Although defendant has not asked nor does this court here purport to decide the constitutionality of the last clause beginning with the word "unless" of La. C.Cr.P. art. 795(C) per se, the continued scrutiny given to that article should not go unnoticed by the bench and bar of this state." *State v. Crawford*, 2016 La. Lexis 2376 (2016).[17]

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[16] See Louisiana Supreme Court Rules, District Court Rule Title III, Chapter 19 Appendix (Simultaneous Peremptory Challenges).

[17] Though *Crawford* was ultimately decided on *Batson* grounds, two justices believed that the State had not even met its burden under *Jackson v. Virginia*, 443 U.S. 307 (1979), in the case, as "the most that Dr. Traylor and Caddo Parish Coroner Dr. Todd Thoma could opine about these injuries is

After imposing a rule that excludes direct evidence of racial animus, the Louisiana Supreme Court then rejected post-trial statistical evidence of race based strikes in the parish.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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that this bruising was "consistent" with smothering." *Id.* (Knoll, J., Johnson C.J., concurring).